

CENTRE OF EXCELLENCE

EUROPEAN UNION DIRECT TAXES

**Contact:****Marc Verbeek**

European Union Direct Taxes Centre of Excellence

BDO in Zaventem, Belgium

Marc.Verbeek@bdo.be**Andrea Bilitewski**

Chair of the European Union Direct Taxes Centre of Excellence

BDO Hamburg, Germany

Andrea.Bilitewski@bdo.de

Belgium - ECJ Judgment on Cross-Border Transfer Pricing Adjustments: *Société de Gestion Industrielle*

On 21 January 2010 the ECJ ruled in the *Société de Gestion Industrielle (SGI)* case that the Belgian cross-border transfer pricing provision does not infringe the freedom of establishment (C-311/08).

Belgian Income Tax Code allows benefits (not being at arm's length) granted by a Belgian resident company to a non-resident related company to be added back to the grantor's taxable basis, whereas benefits granted to a Belgian related company would normally not be added back, since they are already included in the taxable basis of the Belgian beneficiary.

The ECJ considered that Belgian transfer pricing rules constitute a restriction on the freedom of establishment. However it ruled that this restriction is justified by the need to ensure a balanced allocation of the power to tax between Member States, and to combat tax avoidance and abusive practices.

The ECJ also considered that Belgian transfer pricing rules do not go beyond what is necessary to reach their goals, since any adjustment is restricted to the amount exceeding the arm's length compensation, and since the burden of proof lies with the tax authorities whereas the taxpayer has the right to demonstrate bona fide reasons.

COMMENT

Various European Countries have transfer pricing regulations for cross-border activities between related companies like Belgium and a lot of international tax experts were of the opinion that such rules are incompatible with EU law. However, this ECJ judgment makes clear that such an approach of EU Member States to save their tax base is generally justified. In a first step it is irrelevant that the increase of the national taxable base by the granted benefits might, in the synopsis of the parties involved, contain a double taxation for the entire group. However, in a second step one should be able to avoid such double taxations by applying the EU-Arbitration-Convention.

Only national regulations which go beyond what is necessary to reach their goals might be in contradiction to EU law. This might be the case if the adjustments are not restricted to an arm's length transfer price.

This publication has been carefully prepared, but it has been written in general terms and should be seen as broad guidance only. The publication cannot be relied upon to cover specific situations and you should not act, or refrain from acting, upon the information contained therein without obtaining specific professional advice. Please contact BDO to discuss these matters in the context of your particular circumstances. Neither BDO nor its partners, employees or agents accept or assume any liability or duty of care for any loss arising from any action taken or not taken by anyone in reliance on the information in this publication or for any decision based on it.

Service provision within the international BDO network of independent member firms ('the BDO network') is coordinated by Brussels Worldwide Services BVBA, a limited liability company incorporated in Belgium with its statutory seat in Brussels. Each of BDO International Limited (the governing entity of the BDO network), Brussels Worldwide Services BVBA and the member firms is a separate legal entity and has no liability for another such entity's acts or omissions. Nothing in the arrangements or rules of the BDO network shall constitute or imply an agency relationship or a partnership between BDO International Limited, Brussels Worldwide Services BVBA and/or the member firms of the BDO network.

BDO is the brand name for the BDO network and for each of the BDO member firms.

www.bdointernational.com